

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MAR 25 2004

JAMES R. LARSEN, CLERK
DEPUTY
SPOKANE, WASHINGTON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MARIA CHAVEZ, et al., on behalf
of themselves and all others
similarly situated,

Plaintiffs,

v.

IBP, Inc., LASSO ACQUISITION
CORPORATION, and TYSON
FOODS, INC., all Delaware
corporations,

Defendants.

NO. CT-01-5093-RHW

**ORDER ADDRESSING
DEFENDANTS' MOTION**

Before the Court is Defendants' Motion For Leave of Court to Serve Questionnaires (Ct. Rec. 418); Motion for Leave of Court to Cite Unpublished Opinions (Ct. Rec. 420); and Motion to Compel the Timely Disclosure of the Identity of Class Members that Plaintiffs intend to call as Trial Witnesses (Ct. Rec. 422). A telephonic hearing was heard on the matter on March 24, 2004. Plaintiffs were represented by David Mark and William Rutzick; Defendants were represented by Michael Mueller, Allison Balus, and Robert Tenney.

In its first motion, Defendants move the Court for an order requiring all members of Plaintiffs' class to answer a written questionnaire and to provide the answers within 10 days of receipt. The questionnaire would be sent to approximately 3,000 to 5,000 class members. Defendants justify the request on the grounds that it will help them identify those class members that they want to depose prior to trial and to assist in selecting their own witnesses for trial.

1 Discovery of absentee or unnamed class members is “neither prohibited nor
2 sanctioned explicitly” by the Federal Rules of Civil Procedure. *Krueger v. New*
3 *York Tel. Co.*, 163 F.R.D. 446, 450 (S.D.N.Y. 1995). It is within “the court’s
4 discretion to utilize this procedure except when it only will confuse the absentees,
5 some class members can demonstrate that it will prejudice their rights, it will be
6 employed prematurely or administered in an inappropriate fashion, or it will serve
7 only to reduce the efficiencies of the class action.” 7B Charles Alan Wright *et al.*,
8 Federal Practice and Procedure § 1787 at 218-19 (2d ed.1986). The party moving
9 to include the questionnaire has the burden of proving necessity. *Clark v.*
10 *Universal Builders, Inc.*, 501 F.2d 324, 340 (7th Cir. 1974). Generally speaking,
11 “an absent class-action plaintiff is not required to do anything.” *Phillips*
12 *Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985).

13 Here, the Court finds that no good reason exists for the granting of
14 Defendants’ motion. Defendants’ request comes at a late hour. Discovery ends on
15 May 15, 2004, approximately three months from the filing of Defendants’ motion.
16 At the December, 2002 hearing, it was revealed that Defendants had not conducted
17 any deposition discovery. Since then, Defendants report that they have only taken
18 discovery depositions of the five representative plaintiffs and have yet to note a
19 deposition of any other class member, even though the Court had authorized
20 Defendants to take sixty depositions.

21 Moreover, the Court finds that Defendants can determine whom to depose
22 from its own records and knowledge of the plant. Defendants know who worked
23 what positions and when they did so. A questionnaire is unnecessary for this
24 purpose. Also, other discovery devices, which do not require *ex parte*
25 communications with represented parties, would be adequate for the purposes of
26 determining facts pertaining to class plaintiffs for use in evidence. The burden
27 imposed on the class members by such *ex parte* contact is not warranted.
28 Requiring a ten-day response time is unrealistic. The questionnaire would

1 dominate the remaining discovery time, and because it is not proper for *ex parte*
2 contact, would place an unfair burden on Plaintiffs' counsel who would have to
3 assist class members in answering the questionnaire. To the extent Defendants
4 assert that this information is needed for their expert witnesses, they have not
5 made a substantial showing for the information. They did not provide any
6 declarations from any experts expressing the need for this information or how it
7 would be used. For these reasons, Defendants' Motion For Leave of Court to
8 Serve Questionnaires is denied.

9 Defendants' second Motion asks the Court to compel Plaintiffs to provide
10 their witness list, 60 days prior to the discovery cut-off of May 15, 2004. In order
11 to grant this request, the Court would have to amend the schedule provided in the
12 Scheduling Order. In the Order, the parties were required to file their respective
13 exhibit and witnesses lists on or before July 3, 2004. The Court is not convinced
14 that it is necessary to amend the Scheduling Order; however, Plaintiffs have
15 offered to list some witnesses as requested. As such, Defendants' Motion is
16 granted, in part.

17 **Accordingly, IT IS HEREBY ORDERED:**

18 1. Plaintiffs are directed to provide Defendants a partial list of class
19 members that they intend to call as witnesses at the trial on or before **April 12,**
20 **2004.** The partial list shall consist of two witnesses from each job classification
21 for which Plaintiffs seek recovery. The remaining witnesses that Plaintiffs intend
22 to call at trial need not be listed until the date provided in the scheduling order.

23 2. Defendants' Motion For Leave of Court to Serve Questionnaires (Ct.
24 **Rec. 418**) is **DENIED.**

25 3. Defendants' Motion for Leave of Court to City Unpublished Opinions
26 (Ct. **Rec. 420**) is **GRANTED.**

27 4. Defendants' Motion to Compel the Timely Disclosure of the Identity of
28 Class Members that Plaintiffs intend to call as Trial Witnesses (Ct. **Rec. 422**) is

1 **GRANTED**, in part.

2 5. A telephonic conference is scheduled for March 25, 2004 is **stricken**.

3 **IT IS SO ORDERED.** The District Court Executive is directed to enter
4 this order and to provide copies to counsel.

5 **DATED** this 25 day of March, 2004.

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8 **ROBERT H. WHALEY**
United States District Court

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